

Second Regular Session
Seventy-third General Assembly
STATE OF COLORADO

DRAFT
10.6.21

Bill 4

LLS NO. 22-0181.01 Richard Sweetman x4333

INTERIM COMMITTEE BILL

Water Resources Review Committee

BILL TOPIC: "Water Efficiency Savings"

A BILL FOR AN ACT

101 **CONCERNING WATER EFFICIENCY SAVINGS, AND, IN CONNECTION**
102 **THEREWITH, PROTECTING THE WATER RIGHTS OF PERSONS WHO**
103 **IMPLEMENT EFFICIENCY IMPROVEMENTS AND METHODS THAT**
104 **REDUCE WATER USE AND AUTHORIZING THE VOLUNTARY**
105 **TRANSFER OF WATER EFFICIENCY SAVINGS TO THE COLORADO**
106 **WATER CONSERVATION BOARD FOR INSTREAM FLOW USE**
107 **PURPOSES.**

Bill Summary

(Note: This summary applies to this bill as introduced and does not reflect any amendments that may be subsequently adopted. If this bill passes third reading in the house of introduction, a bill summary that applies to the reengrossed version of this bill will be available at <http://leg.colorado.gov/>.)

*Capital letters or bold & italic numbers indicate new material to be added to existing statute.
Dashes through the words indicate deletions from existing statute.*

Water Resources Review Committee. Current law provides that a period of nonuse of a portion of a water right is tolled, and no intent to discontinue permanent use is found for purposes of determining an abandonment of a water right, for the duration that the nonuse of the water right by its owner is a result of any of certain conditions. **Section 1** of the bill adds a condition that applies when the nonuse of a portion of a water right is a result of the implementation of efficiency improvements or methods that result in water efficiency savings. In such case:

- For the period of nonuse to be tolled, the owner of the water right must submit written notice of the efficiency improvements or methods to the engineer for the water division in which the water right is located (division engineer), on a form prescribed by the state engineer, within one year after the date that the efficiency improvements or methods are first implemented; and
- The owner of the water right must give the division engineer the opportunity to verify the implementation of the efficiency improvements or methods.

Section 1 also defines "water efficiency savings" as an amount of water, as determined in a water court proceeding, by which ditch seepage, surface run-off, return flow, or tailwater return will be reduced as a result of efficiency improvements or methods that increase the efficiency of water storage, diversion, conveyance, application, or use practices associated with a water right. Water efficiency savings can be derived only from water that is not consumed under existing practices and from water rights or portions of water rights that are used for irrigation or stock watering purposes. "Water efficiency savings" does not include:

- Water derived from the salvage of tributary waters by the eradication of phreatophytes; or
- Any portion of historical water diversions that was not decreed or that was not reasonably efficient as determined by the water judge in a change-of-water-right proceeding.

Sections 2 and 3 allow water efficiency savings to be transferred to the Colorado water conservation board for instream flow use purposes, subject to certain standards and limitations. In effecting such a transfer, the water judge may include in the change decree conditions by which the original decreed diversion rate may be preserved for a future use by the water right owner who implements the structural improvements if use of the structural improvements is later discontinued.

1 *Be it enacted by the General Assembly of the State of Colorado:*

2 **SECTION 1.** In Colorado Revised Statutes, 37-92-103, **amend**

1 (2) introductory portion and (2)(b); and **add** (11.5) as follows:

2 **37-92-103. Definitions.** As used in this article 92, unless the
3 context otherwise requires:

4 (2) "Abandonment of a water right" means the termination of a
5 water right in whole or in part as a result of the intent of the owner
6 ~~thereof~~ OF THE WATER RIGHT to discontinue permanently the use of all or
7 part of the water available ~~thereunder~~ UNDER THE WATER RIGHT. Any
8 period of nonuse of any portion of a water right shall be tolled, and no
9 intent to discontinue permanent use shall be found for purposes of
10 determining an abandonment of a water right for the duration that:

11 (b) The nonuse of a water right by its owner is a result of:
12 ~~participation in:~~

13 (I) PARTICIPATION IN a water conservation program approved by
14 a state agency, a water conservation district, or a water conservancy
15 district;

16 (II) PARTICIPATION IN a water conservation program established
17 through formal written action or ordinance by a municipality or its
18 municipal water supplier;

19 (III) PARTICIPATION IN an approved land fallowing program as
20 provided by law in order to conserve water;

21 (IV) PARTICIPATION IN a water banking program as provided by
22 law;

23 (V) PARTICIPATION IN a loan of water to the Colorado water
24 conservation board for instream flow use under section 37-83-105 (2); ~~or~~

25 (VI) PARTICIPATION IN any contract or agreement with the
26 Colorado water conservation board that allows the board to use all or a
27 part of a water right to preserve or improve the natural environment to a

1 reasonable degree under section 37-92-102 (3); OR

2 (VII) THE IMPLEMENTATION OF EFFICIENCY IMPROVEMENTS OR
3 METHODS THAT RESULT IN A REDUCTION OF THE AMOUNT OF WATER
4 DIVERTED FOR THE DECREED BENEFICIAL USE; EXCEPT THAT:

5 (A) FOR THE PERIOD OF NONUSE TO BE TOLLED, THE OWNER OF THE
6 WATER RIGHT MUST SUBMIT WRITTEN NOTICE OF THE EFFICIENCY
7 IMPROVEMENTS OR METHODS TO THE DIVISION ENGINEER, ON A FORM
8 PRESCRIBED BY THE STATE ENGINEER, WITHIN ONE YEAR AFTER THE DATE
9 THAT THE EFFICIENCY IMPROVEMENTS OR METHODS ARE FIRST
10 IMPLEMENTED, AND THE OWNER OF THE WATER RIGHT MUST GIVE THE
11 DIVISION ENGINEER THE OPPORTUNITY TO VERIFY THE IMPLEMENTATION
12 OF THE EFFICIENCY IMPROVEMENTS OR METHODS;

13 (B) THE NONUSE OF ANY PORTION OF A WATER RIGHT RESULTING
14 FROM THE IMPLEMENTATION OF EFFICIENCY IMPROVEMENTS OR METHODS
15 IS TOLLED, BEGINNING ON THE DATE UPON WHICH THE OWNER OF THE
16 WATER RIGHT PROVIDES WRITTEN NOTICE OF THE EFFICIENCY
17 IMPROVEMENTS OR METHODS TO THE DIVISION ENGINEER; AND

18 (C) NOTHING IN THIS SUBSECTION (2)(b)(VII) ALLOWS INCREASED
19 OR EXPANDED CONSUMPTIVE USE UNDER A WATER RIGHT.

20 (11.5) (a) "WATER EFFICIENCY SAVINGS" MEANS AN AMOUNT OF
21 WATER, AS DETERMINED IN A WATER COURT PROCEEDING, BY WHICH DITCH
22 SEEPAGE, SURFACE RUN-OFF, RETURN FLOW, OR TAILWATER RETURN WILL
23 BE REDUCED AS A RESULT OF EFFICIENCY IMPROVEMENTS OR METHODS
24 THAT INCREASE THE EFFICIENCY OF WATER STORAGE, DIVERSION,
25 CONVEYANCE, APPLICATION, OR USE PRACTICES ASSOCIATED WITH A
26 WATER RIGHT.

27 (b) WATER EFFICIENCY SAVINGS CAN BE DERIVED ONLY FROM:

1 (I) WATER THAT IS NOT CONSUMED UNDER EXISTING PRACTICES;
2 AND

3 (II) WATER RIGHTS OR PORTIONS OF WATER RIGHTS THAT ARE
4 USED FOR IRRIGATION OR STOCK WATERING PURPOSES.

5 (c) "WATER EFFICIENCY SAVINGS" DOES NOT INCLUDE:

6 (I) WATER DERIVED FROM THE SALVAGE OF TRIBUTARY WATERS
7 BY THE ERADICATION OF PHREATOPHYTES; OR

8 (II) ANY PORTION OF HISTORICAL WATER DIVERSIONS THAT WAS
9 NOT DECREED OR THAT WAS NOT REASONABLY EFFICIENT AS DETERMINED
10 BY THE WATER JUDGE IN A CHANGE-OF-WATER-RIGHT PROCEEDING.

11 **SECTION 2.** In Colorado Revised Statutes, 37-92-305, **add** (3.3)
12 as follows:

13 **37-92-305. Standards with respect to rulings of the referee and**
14 **decisions of the water judge - definitions.** (3.3) (a) WATER EFFICIENCY
15 SAVINGS ARE AN INTEREST IN WATER THAT CAN BE TRANSFERRED TO THE
16 COLORADO WATER CONSERVATION BOARD FOR INSTREAM FLOW USE,
17 SUBJECT TO THE REQUIREMENTS APPLICABLE TO A CHANGE OF WATER
18 RIGHT AND THE REQUIREMENTS OF THIS SUBSECTION (3.3).

19 (b) (I) THE WATER JUDGE MAY APPROVE A CHANGE OF WATER
20 RIGHT FOR WATER EFFICIENCY SAVINGS TO INSTREAM FLOW USE ONLY IF:

21 (A) THE COLORADO WATER CONSERVATION BOARD HAS ACCEPTED
22 THE TRANSFER OF WATER EFFICIENCY SAVINGS FOR INSTREAM FLOW USE
23 UNDER SECTION 37-92-102 (3);

24 (B) THE CHANGE WILL NOT MATERIALLY INJURE VESTED WATER
25 RIGHTS OR DECREED CONDITIONAL WATER RIGHTS AND STREAM
26 CONDITIONS ARE MAINTAINED IN TIME, PLACE, AND AMOUNT, INCLUDING
27 REPLACEMENT OF RETURN FLOWS, AS NECESSARY TO AVOID SUCH INJURY;

1 (C) THE CHANGE WILL NOT ADVERSELY AFFECT COLORADO'S
2 ENTITLEMENTS OR OBLIGATIONS UNDER INTERSTATE COMPACTS OR
3 UNITED STATES SUPREME COURT EQUITABLE APPORTIONMENT DECREES;
4 AND

5 (D) THE AMOUNT OF CHANGED WATER IS NOT MORE THAN THE
6 AMOUNT THAT THE COLORADO WATER CONSERVATION BOARD, AFTER
7 TAKING INTO ACCOUNT THE WATER EFFICIENCY SAVINGS TO BE DERIVED
8 FROM THE EFFICIENCY IMPROVEMENTS OR METHODS REFERRED TO IN
9 SECTION 37-92-103 (11.5)(a), DETERMINES IS THE MINIMUM AMOUNT
10 NECESSARY TO ADD TO THE STREAM FLOWS TO PRESERVE OR IMPROVE THE
11 NATURAL ENVIRONMENT TO A REASONABLE DEGREE PURSUANT TO
12 SECTION 37-92-102 (3).

13 (II) THE CHANGE DECREE MUST IDENTIFY:

14 (A) THE AMOUNT OF WATER EFFICIENCY SAVINGS AND THE
15 REDUCED RATE OF DIVERSION;

16 (B) THE FLOW RATE OF THE INSTREAM FLOW RIGHT;

17 (C) THE STREAM REACH WITHIN WHICH THE WATER EFFICIENCY
18 SAVINGS WILL BE USED AS INSTREAM FLOW, THE UPSTREAM TERMINUS OF
19 WHICH MUST BE NO HIGHER THAN THE HISTORICAL POINT OF DIVERSION
20 AND THE DOWNSTREAM TERMINUS OF WHICH MUST BE NO LOWER THAN
21 THE LOWEST POINT OF HISTORICAL RETURN FLOWS; AND

22 (D) ALL TERMS AND CONDITIONS NECESSARY TO AVOID MATERIAL
23 INJURY. IF THERE ARE VESTED WATER RIGHTS OR DECREED CONDITIONAL
24 WATER RIGHTS BETWEEN THE UPSTREAM TERMINUS AND DOWNSTREAM
25 TERMINUS OF THE IDENTIFIED INSTREAM FLOW REACH, THE WATER JUDGE
26 SHALL IMPOSE CONDITIONS THAT ENSURE THE MAINTENANCE OF THE
27 STREAM CONDITIONS ON WHICH SUCH INTERVENING WATER RIGHTS

1 HISTORICALLY RELIED, INCLUDING REPLACEMENT OF RETURN FLOWS IN
2 THE IDENTIFIED REACH, AS NECESSARY TO AVOID MATERIAL INJURY.

3 (c) WATER EFFICIENCY SAVINGS THAT ARE CHANGED PURSUANT
4 TO THIS SUBSECTION (3.3) ARE NOT SUBJECT TO ABANDONMENT DURING
5 THE PERIOD OF THE INSTREAM FLOW USE BY THE COLORADO WATER
6 CONSERVATION BOARD.

7 (d) THE WATER JUDGE MAY INCLUDE IN THE CHANGE DECREE
8 CONDITIONS PURSUANT TO WHICH THE ORIGINAL DECREED DIVERSION
9 RATE MAY BE PRESERVED FOR A FUTURE USE BY THE WATER RIGHT OWNER
10 WHO IMPLEMENTS THE EFFICIENCY IMPROVEMENTS OR METHODS
11 REFERRED TO IN SECTION 37-92-103 (11.5)(a) IF USE OF THE EFFICIENCY
12 IMPROVEMENTS OR METHODS IS LATER DISCONTINUED.

13 (e) IN THE PROCEEDINGS TO CHANGE WATER EFFICIENCY SAVINGS
14 TO INSTREAM FLOW USE AND NOTWITHSTANDING SECTION 37-92-102 (3),
15 THE WATER JUDGE SHALL QUANTIFY HISTORICAL CONSUMPTIVE USE ONLY
16 IF NECESSARY TO:

17 (I) CALCULATE THE AMOUNT OF WATER BY WHICH DITCH SEEPAGE,
18 SURFACE RUN-OFF, RETURN FLOW, OR TAILWATER RETURN WILL BE
19 REDUCED; OR

20 (II) DETERMINE WHETHER ANY PORTION OF HISTORICAL WATER
21 DIVERSIONS WAS NOT REASONABLY EFFICIENT.

22 **SECTION 3.** In Colorado Revised Statutes, 37-92-102, **amend**
23 (3) introductory portion; and **add** (3)(f) as follows:

24 **37-92-102. Legislative declaration - basic tenets of Colorado**
25 **water law.** (3) Further recognizing the need to correlate the activities of
26 mankind with some reasonable preservation of the natural environment,
27 the Colorado water conservation board is hereby vested with the

1 exclusive authority, on behalf of the people of the state of Colorado, to
2 appropriate in a manner consistent with sections 5 and 6 of article XVI of
3 the state constitution, such waters of natural streams and lakes as the
4 board determines may be required for minimum stream flows or for
5 natural surface water levels or volumes for natural lakes to preserve the
6 natural environment to a reasonable degree. In the adjudication of water
7 rights pursuant to this ~~article~~ ARTICLE 92 and other applicable law, no
8 other person or entity shall be granted a decree adjudicating a right to
9 water or interests in water for instream flows in a stream channel between
10 specific points, or for natural surface water levels or volumes for natural
11 lakes, for any purpose whatsoever. The board also may acquire, by grant,
12 purchase, donation, bequest, devise, lease, exchange, or other contractual
13 agreement, from or with any person, including any governmental entity,
14 such water, water rights, or interests in water that are not on the division
15 engineer's abandonment list in such amount as the board determines is
16 appropriate for stream flows or for natural surface water levels or
17 volumes for natural lakes to preserve or improve the natural environment
18 to a reasonable degree. At the request of any person, including any
19 governmental entity, the board shall determine in a timely manner, not to
20 exceed one hundred twenty days unless further time is granted by the
21 requesting person or entity, what terms and conditions it will accept in a
22 contract or agreement for such acquisition. Any contract or agreement
23 executed between the board and any person or governmental entity that
24 provides water, water rights, or interests in water to the board shall be
25 enforceable by either party ~~thereto~~ TO THE CONTRACT OR AGREEMENT as
26 a water matter under this ~~article~~ ARTICLE 92, according to the terms of the
27 contract or agreement. The board shall adopt criteria for evaluating

1 proposed contracts or agreements for leases or loans of water, water
2 rights, or interests in water under this subsection (3), including, but not
3 limited to, criteria addressing public notice, the extent to which the leased
4 or loaned water will benefit the natural environment to a reasonable
5 degree, and calculation of the compensation paid to the lessor of the water
6 based upon the use of the water after the term of the lease. As a condition
7 of approval of a proposed contract or agreement for a lease or loan of
8 water, water rights, or interests in water pursuant to this subsection (3),
9 the board shall obtain confirmation from the division engineer that the
10 proposal is administrable and is capable of meeting all applicable
11 statutory requirements. All contracts or agreements entered into by the
12 board for leases or loans of water, water rights, or interests in water
13 pursuant to this subsection (3) shall require the board to maintain records
14 of how much water the board uses under the contract or agreement each
15 year it is in effect and to install any measuring devices deemed necessary
16 by the division engineer to administer the contract or agreement and to
17 measure and record how much water flows out of the reach after use by
18 the board under the contract or agreement, unless a measuring device
19 already exists on the stream that meets the division engineer's
20 requirements. All contracts or agreements for water, water rights, or
21 interests in water under this subsection (3) ~~shall~~ MUST provide that,
22 pursuant to the water court decree implementing the contract or
23 agreement, the board or the lessor, lender, or donor of the water may
24 bring about beneficial use of the historical consumptive use of the leased,
25 loaned, or donated water right downstream of the instream flow reach as
26 fully consumable reusable water. The board shall file a change of water
27 right application or other application with the water court to obtain a

1 decreed right to use water for instream flow purposes under a contract or
2 agreement for a lease or loan of water, water rights, or interests in water
3 pursuant to this subsection (3). The resulting water court decree shall
4 quantify the historical consumptive use of the leased or loaned water right
5 and determine the method by which the historical consumptive use should
6 be quantified and credited during the term of the agreement for the lease
7 or loan of the water right. Said method ~~shall~~ MUST recognize the actual
8 amount of consumptive use available under the leased or loaned water
9 right and ~~shall~~ MUST not result in a reduction of the historical
10 consumptive use of that water right during the term of the lease or loan,
11 except to the extent such reduction is based upon the actual amount of
12 water available under said rights. All water rights under such decrees
13 shall be administered in priority. The board may not accept a donation of
14 water rights that ~~either~~ would require the removal of existing
15 infrastructure without approval of the current owner of such
16 infrastructure, ~~or~~ AND THE BOARD MAY NOT ACCEPT A DONATION OF
17 WATER RIGHTS that were acquired by condemnation. The board may use
18 any funds available to it for acquisition of water rights and their
19 conversion to instream flow rights. The board may initiate such
20 applications as it determines are necessary or desirable for utilizing water,
21 water rights, or interests in water appropriated, acquired, or held by the
22 board, including applications for changes of water rights, exchanges, or
23 augmentation plans. Prior to the initiation of any such appropriation or
24 acquisition, the board shall request recommendations from the division
25 of parks and wildlife. The board also shall request recommendations from
26 the United States department of agriculture and the United States
27 department of the interior. Nothing in this ~~article~~ ARTICLE 92 shall be

1 construed as authorizing any state agency to acquire water by eminent
2 domain or to deprive the people of the state of Colorado of the beneficial
3 use of those waters available by law and interstate compact. Nothing in
4 this subsection (3) shall impact section 37-60-121 (2.5). Any
5 appropriation made pursuant to this subsection (3) shall be subject to the
6 following principles and limitations:

7 (f) (I) NOTWITHSTANDING ANY REFERENCE TO CONSUMPTIVE USE
8 OR ANY OTHER PROVISION OF THIS SUBSECTION (3) TO THE CONTRARY, THE
9 COLORADO WATER CONSERVATION BOARD MAY ACQUIRE WATER
10 EFFICIENCY SAVINGS FOR INSTREAM FLOW USE PURSUANT TO SECTION
11 37-92-305 (3.3). THIS SUBSECTION (3) APPLIES TO SUCH ACQUISITION,
12 EXCEPT TO THE EXTENT THAT THIS SUBSECTION (3) IS INCONSISTENT WITH
13 AN ACQUISITION OF WATER THAT WAS HISTORICALLY NOT CONSUMED.

14 (II) THE BOARD SHALL CONSIDER PRACTICES AND AGREEMENTS,
15 FORMAL AND INFORMAL, AMONG POTENTIALLY AFFECTED WATER USERS
16 WHEN CONSIDERING WHETHER TO PLACE A CALL FOR ANY INSTREAM FLOW
17 USE ADJUDICATED FROM WATER EFFICIENCY SAVINGS.

18 **SECTION 4. Act subject to petition - effective date -**
19 **applicability.** (1) This act takes effect at 12:01 a.m. on the day following
20 the expiration of the ninety-day period after final adjournment of the
21 general assembly; except that, if a referendum petition is filed pursuant
22 to section 1 (3) of article V of the state constitution against this act or an
23 item, section, or part of this act within such period, then the act, item,
24 section, or part will not take effect unless approved by the people at the
25 general election to be held in November 2022 and, in such case, will take
26 effect on the date of the official declaration of the vote thereon by the
27 governor.

1 (2) This act applies to abandonment determinations and
2 applications for leases and loans of water to the Colorado water
3 conservation board for instream flow use, which determinations and
4 applications occur on or after the effective date of this act.